BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Business Broadband Marketplace	)	WC Docket No. 10-188
	)	
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COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter") submits these comments in response to the Wireline Competition Bureau's Public Notice for comments on the "business broadband marketplace."[1] The Notice seeks input from providers, customers, and any other interested parties regarding the current state of, and trends and issues in, business broadband markets, information that will help inform policies that enable competitive retail markets, incentives for investments in facilities, and access where competitive infrastructure cannot be economically deployed.

Charter is the nation's 4th largest cable television operator, with approximately 5.3 million customers in 27 states, including small and medium businesses ("SMBs"). Of the 639 U.S. counties in which Charter provides cable, high-speed broadband, telephony and video services, more than half are "majority rural," according to U.S. Census standards. Since 2000, Charter has invested over $8 billion to deploy broadband, competitive voice and advanced video services. Accordingly, Charter offers considerable and unique insight into opportunities to expand the availability of competitive service in the business broadband market. In particular, Charter understands that barriers to competitive entry in rural markets have a significant impact

[1] Public Notice, Wireline Competition Bureau Seeks Comment on Business Bureau Marketplace, DA 10-1743 (rel. Sept. 15, 2010) ("Notice")

on the business broadband marketplace in these areas, as they can delay the entry of competitive services and raise initial investment costs, thereby negatively affecting consumer prices and availability of services, and, in turn, impeding broadband deployment and adoption. Indeed, the National Broadband Plan ("NBP") has recognized that cost is a major obstacle to broadband adoption and utilization.[2] SMBs, in particular, already pay significantly more per employee for broadband services.[3] Thus, SMBs in non-competitive areas are at a significant disadvantage when compared to other SMBs that have access to better service options at competitive rates.

To encourage the rapid deployment of competitive broadband services, the Commission would best serve SMBs and the marketplace, in general, by eliminating these barriers to competitive entry. Some of the key barriers that the Commission can immediately address are: (1) resistance by incumbent providers in negotiating interconnection agreements; (2) disputes with pole owners regarding the rates, terms and conditions of pole attachments; and (3) unreasonable restrictions imposed by incumbent providers and building owners to access SMBs and other commercial tenants in multi-tenant environments.

I. The Commission Should Declare That Rural ILECs Have A Duty To Interconnect With Competitive Providers

A crucial component to deploying competitive broadband-based services, like interconnected VoIP, to SMBs and other customer segments is interconnection.[4] Competitive services must be able to connect their networks with incumbent providers if their services are to

[2] Connecting America: The National Broadband Plan, March 16, 2010, at 168, 170 ("NBP").

[3] *Id*. at 267.

[4] *Id*. at 35 (finding that competition is "crucial for enabling competition in the small business and enterprise segments").

have any practical use.[5] Broadband-based voice services like VoIP represent the most successful facilities-based competition to traditional voice services.[6] Reports have found that VoIP has resulted in significant savings for SMBs.[7]

Not surprisingly, many incumbents have strongly resisted the entry of competitive services into their monopoly markets to the detriment of consumers and businesses who, as a result, are relegated to relying on legacy services. Rural incumbent local exchange carriers ("RLECs" or "rural ILECs"), in particular, have thwarted competition by consistently contending that they are not required to interconnect with competitive providers because of the rural exemption found under Section 252(f)(1). Faced with such opposition, competitive providers have had no choice but to initiate lengthy and expensive arbitration proceedings before state commissions, or withdraw their interconnection requests altogether.

It does not help that state commissions have inconsistently ruled on an RLEC's duty to interconnect. The NBP noted that a federal court's decision allowing rural carriers to refuse to negotiate interconnection agreements with other carriers was "based on a misinterpretation of the Act's rural exemption and interconnection requirements" and, unfortunately, this ruling has been

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[5] *Id*. at 49 ("For consumers to have a choice of service providers, competitive carriers need to be able to interconnect their networks with incumbent providers.").

[6] *See, e.g.*, *Cambridge Telephone Company, et al*, Order, Docket No. 05-0259, *et al*, slip op. at 11 (Ill Commerce Comm., July 13, 2005) ("*Sprint-Illinois Order*") (recognizing that Sprint's interest in interconnecting with the RLECs "is significant in that it represents one of the first, if not the first, competitive landline ventures into the relevant exchanges.").

[7] *See* Michael D. Pelcovits and Daniel E. Haar, *Consumer Benefits from Cable-Telco Competition*, Nov. 2007, at 21-22 (finding that SMBs have cut their phone bills by as much as 50-70 percent using competitive VoIP services, with total savings to SMBs exceeding $17 billion between 2008 to 2012), *available at* http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

followed by several state commissions.[8] At the same time, other state commissions have rejected RLECs' arguments, and have instead directed these RLECs to negotiate interconnection with other carriers, including those carriers who seek interconnection in order to introduce broadband-based competitive voice services like interconnected VoIP.[9]

The Commission can resolve these conflicting state commission decisions and eliminate this discrete yet significant barrier to competitive entry by promptly ruling on the petition of CRC Communications and Time Warner Cable for preemption of the Maine Public Utilities Commission's ("MPUC") decision that an RLEC does not have a duty to interconnect under Sections 251(a) and (b) in light of the rural exemption under Section 251(f)(1).[10] As explained by one commenter, "the MPUC's ruling impermissibly allows (indeed, invites) rural ILECs to flout their statutory interconnection and traffic exchange obligations and unilaterally bar competitors from serving voice customers in their territories simply by refusing to negotiate interconnection/traffic exchange agreements."[11] A Commission order that does not expressly preempt the MPUC's decision would only serve to encourage RLECs to unilaterally discourage competition, and would run counter to the Commission's broadband policies and the

[8] NBP at 49 n.91 and 92 (citing comments of Time Warner Cable discussing *Sprint Commc'ns Co. LP v. Pub. Util. Comm'n of Tex.*, No. A-06-CA-065-SS, 2006 US Dist. LEXIS 96569 (W.D. Tex. Aug. 14, 2006) and state commission decisions in Maine, Texas and North Dakota).

[9] *See, e.g.*, *Sprint-Illinois Order*, slip op. at 5-6; *Petitions of Vermont Telephone Company, Inc. and Comcast Phone of Vermont, LLC d/b/a Comcast Digital Phone, for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecommunications Act of 1996, and Applicable State Laws*, Final Order, Docket No. 7469, slip op. at 20-21 (Vt. PSB, Feb. 2, 2009) ("*Comcast-Vermont Order*").

[10] *See* Public Notice, Comment Sought on CRC Communications of Maine and Time Warner Cable Petition for Preemption, WC Docket No. 10-143, DA 10-XX (rel. July 29, 2010); *In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC Docket No. 10-143 (filed July 15, 2010).

[11] Comments of Comptel, filed Aug. 30, 2010.

recommendations of the NBP. The Commission should instead rule in favor of competition and follow the recommendations of the NBP,[12] its own precedent[13] and the rulings of state commissions[14] that have determined that the exemption provided under Section 251(f)(1) applies only to the duty to negotiate in good faith under Section 251(c), but does not extend to Sections 251(a) and (b).

II. The Commission's Pole Attachment Proposals Will Help To Eliminate Barriers To Competitive Entry

Another significant barrier to competitive entry that the Commission is only too familiar with is access to pole attachments. Even if a competitive provider obtains interconnection with an incumbent, it must still be able to deploy its facilities throughout the service area. This necessarily requires the ability to attach facilities to poles. Charter has pole attachment relationships with thousands of utility pole owners nationwide, and understands first-hand the issues involved in negotiating the rates, terms and conditions attendant to the overall pole attachment process. Pole rates, in particular, represent a significant cost component to a competitors' cost of entry.

The history of pole attachments is long, the issues have been fully briefed, and the record is extensive, as noted in recent comments filed by Charter and other interested parties in the

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[12] *See* NBP at 49 (recommending that the Commission "should confirm that all telecommunications carriers, including rural carriers, have a duty to interconnect their networks").

[13] *See In the Matter of Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, ¶ 121 n.401 (1997) ("Rural LECs are not exempt from Section 251(a) or (b) requirements under Section 251(f)(1).").

[14] *See, e.g.*, *Sprint-Illinois Order*, slip op. at 5 ("Consistent with the FCC's treatment of this issue, the Commission finds that an exemption from Section 251(c) does not encompass the obligations imposed in Section 251(b). Section 251(f)(1)(A) provides relief on from the requirements of Section 251(c)."); *Comcast-Vermont Order*, slip op. at 20-21 ("Section 251(f)(1) does not exempt VTel from its duties under Sections 251(a) and (b).").

Commission's latest chapter of its pole proceedings.[15] In the end, the utilities have offered no justification for increased pole rents, and no basis for delaying adoption of helpful pole attachment reforms. Accordingly, the Commission should now act on its reform proposals. In particular, Charter supports the Commission's proposal to reform its approach to the telecom pole rate formula, which will reduce excessive pole attachment fees and protracted disputes, lower barriers to broadband deployment, and still provide utilities with just and reasonable rents. Charter also supports several of the Commission's proposed improvements to the enforcement process, which will discourage unlawful pole owner conduct. Competition in the business broadband marketplace has suffered long enough from the unreasonable imposition of pole rates, terms and conditions of service on competition. Prompt Commission action is needed now to eliminate this barrier so that SMBs and other rural-area customers can have access to competitive broadband services.

III. Non-Discriminatory Access To Commercial MTE Tenants Is Crucial To The Deployment Of Competitive Services

One of the biggest obstacles to the development of competition in the business broadband marketplace is one of the oldest problems that competitive providers have faced since the earliest days of competition: breaking down the barriers that ILECs and building owners have erected to facilities-based competition in multi-tenant environments (MTEs). Fostering an environment in which competitive providers have real opportunities to offer their services to MTE tenants has been on the Commission's agenda for more than a decade now, and the Commission has taken several steps to promote that objective. But those efforts – largely consisting of orders

[15] *See, e.g.*, Comments of Charter Communications, Inc., WC Docket No. 07-245 (filed Aug. 16, 2010); Comments of the National Cable & Telecommunications Association (filed Aug. 16, 2010); Reply Comments of the National Cable & Telecommunications Association (filed Oct. 4, 2010).

abolishing exclusive contracts between building owners and providers – have not gone far enough. To quote an order the Commission issued more than 10 years ago, competitive providers continue to "encounter[] unreasonable demands and significant delay in their efforts to obtain access to buildings."[16] They "have been denied access to buildings completely, or have been charged exorbitant rates for access or been subjected to unreasonable conditions."[17] Further, "incumbent LECs are using their market control over on-premises wiring to frustrate competitive access to multitenant buildings."[18] The slow pace of this progress has left many consumers "without any choices with regard to the provision of telecommunications service" and at the mercy of building owners with "the ability and incentive to extract excessive profits from the provision of telecommunications service by unreasonably restricting competitive LECs' access to their buildings."[19] Similarly, consumer choice continues to be limited by incumbent LECs that have both "the ability and incentive to deny reasonable access [to essential facilities] to competing carriers."[20]

These Commission observations from 2000 are equally true today. Building owners continue to hamper Charter's efforts to provide access to commercial tenants in MTEs. Building owners often engage in unnecessarily protracted negotiations, with some owners refusing to even

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[16] *Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, ¶ 17 (2000) ("*Further Notice*").

[17] *Id*.

[18] *Id*. ¶ 19.

[19] *Id*. ¶ 23.

[20] *Id*. ¶ 24.

negotiate unless Charter already has secured a customer in their building. Such delays remain a grave concern as negotiation periods with building owners can take six months or longer. Building owners have also attempted to impose burdensome and discriminatory conditions. For example, recently building owners have demanded onerous, and in many cases unacceptable, insurance provisions, as well as indemnification clauses that include acts of omission and indemnification of third parties outside the control of Charter. Other owners have demanded unreasonable notice requirements including the "when, who and why" for Charter to access a building, or impose severe restrictions on Charter's access to common areas. In general, building owners have increasingly demanded onerous, one-sided contract clauses that have the practical effect of delaying or even preventing competitive entry to MTEs.

Further, some building owners have insisted upon a multitude of fees, including substantial revenue sharing provisions, monthly recurring fees well above commercial rates, and one-time processing and administrative fees. In contrast, the same building owners provide free access to incumbent providers. In short, this evidence supports the Commission's concern that "premises owners may be unreasonably discriminating among competing telecommunications service providers and that such discrimination may be an obstacle to competition and consumer choice."[21]

Charter therefore urges the Commission to reconsider and adopt the nondiscriminatory access rule that it proposed in its 2000 *Further Notice* (¶¶ 127, 131-59), but ultimately did not adopt. Under that proposal, competitive providers would be allowed to institute proceedings that, if successful, could result in an order prohibiting a LEC from providing telecommunications service to any MTE that refuses to allow reasonable, nondiscriminatory access to competing

[21] *Id*. ¶ 125.

carriers. The Commission has ample authority, under Sections 201 and 205 of the Communications Act, to adopt regulations making it an unreasonable practice for LECs to provide service to MTEs that deny nondiscriminatory access to competitive providers. The fact that such regulations may have an indirect effect on MTE owners — namely, in encouraging them to provide their tenants with the telephony choices they deserve — does not divest the Commission of jurisdiction.[22] This procedure as originally envisioned by the Commission does not implicate the Takings Clause of the Fifth Amendment because it does not mandate the physical occupation of the private property of MTE owners, but instead regulates the conduct of LECs.

With respect to implementation of this proposal, the Commission need not reinvent the wheel, because it already has grappled with similar issues when it implemented the nondiscriminatory access requirements under Section 224(f). Thus, at a minimum, competing LECs must be offered the same access to MTEs as the LEC favored by the building owner. Because innumerable variables are involved, however, the reasonableness of conditions imposed on nondiscriminatory access should be left to case-specific resolution. Nevertheless, the Commission should categorically reject the notion that a competing LEC's nondiscriminatory access rights are not effective unless a tenant first requests service from that carrier, because CLECs generally deploy the facilities necessary to provide service before marketing that service to tenants and, in any event, such a requirement would prevent CLECs from competing for new buildings.

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[22] *Cf. Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd. 5385, ¶ 15 (2008) ("[T]he Commission has authority to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.") (citing *Cable & Wireless v. FCC*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999)).

IV. Conclusion

The business broadband marketplace represents a dynamic and innovative environment for competitive, broadband-based services. However, access to these services, especially in rural markets, remains subject to the desires of those who stand to gain in opposing competitive entry into their exclusive markets, to the detriment of consumers, including small and medium businesses. The Commission should immediately eliminate those barriers to entry that impact interconnection, pole attachments and MTEs, so that businesses can fully appreciate the beneficial effects that competition will bring to the business broadband marketplace.

Respectfully submitted,

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